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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR LEROY HERRERA, JR.,

Defendant and Appellant.

G054945

(Super. Ct. No. 14NF5117)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed in part, reversed in part, and remanded with directions.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Salvador Leroy Herrera, Jr., of assault with a firearm (Pen. Code § 245, subd. (a)(2); all further statutory citations are to the Penal Code unless otherwise stated), making criminal threats (§ 422), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and misdemeanor possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). The jury found true gang and firearm allegations. The trial court sentenced Herrera to total of 28 years in state prison, including a 10-year firearm enhancement, a five-year gang enhancement, and a five-year enhancement for a prior serious felony.

Herrera contends we should reverse his convictions because the pretrial identification procedure was impermissibly suggestive and tainted the in-court identification. However, Herrera forfeited this claim by failing to object below. Additionally, Herrera's related ineffective assistance of counsel claim fails because there was a tactical reason for counsel's failure to object to the allegedly improper pretrial identification procedure.

Herrera also contends the prosecution's gang expert improperly relied on inadmissible hearsay to prove the gang enhancement. Herrera forfeited this claim by failing to object below. In addition, he has not shown trial counsel was ineffective for failing to object.

Finally, Herrera contends his sentence should be vacated and the matter remanded to the superior court for resentencing (1) to exercise its newly granted discretion whether to strike the firearm enhancement imposed (Senate Bill (SB) No. 620 (2017-2018 Reg. Sess.)), (2) to exercise its newly granted discretion whether to strike the enhancement for a prior serious felony conviction (SB No. 1393 (2017-2018 Reg. Sess.)), and to reconsider the gang enhancement. The Attorney General concedes that remand for resentencing is appropriate. We agree and will remand the matter for resentencing.

I

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2014, at about 10:30 in the evening, J.R. was getting ready to drive to his wife's workplace with their two sons when he noticed a burgundy Chevy Impala with chrome rims and a spot on its spoiler stop in front of his house. A Hispanic male exited the Impala. The man ran to J.R.'s vehicle and knocked on the driver's side window. When J.R. rolled down the window, the man leaned in and screamed that he was going to kill J.R. J.R. noticed the man had a shaven haircut and an "A" tattooed on his neck. The man pulled out a black handgun and pointed it at J.R. He said, "That's my barrio [neighborhood], faggot, and I'm in charge here. This whole thing is my barrio." J.R. responded, "Okay, it's your neighborhood, your barrio, and I respect that. And I respect you, so lower your hand with the gun." The man stepped back and yelled that "he was going to kill me but not today because I had my children, but he was going to come back."

After the Hispanic man drove away, J.R. called the police and reported the incident. While waiting for the police at his house, J.R. noticed fresh graffiti on his garage. When the police interviewed J.R. later that evening, he described the assailant to the officer, including the neck tattoo. Nine days later, Officer Richard Browning showed J.R. a photo array containing pictures of six males, including Herrera. Herrera was the only one with a neck tattoo. J.R. selected Herrera's picture, and explained he selected the picture "because of his look, the color of his skin, and his nose." J.R. identified Herrera at trial as the man who had threatened and assaulted him.

On December 16, 2014, Officer Kelly Phillips conducted surveillance of a house in Anaheim. He observed an older male Hispanic male working on a burgundy Impala parked in the driveway. Herrera then approached and worked with the other man on the car before driving the Impala away. The police effectuated a traffic stop and arrested Herrera.

Officer Brian Dalton testified that on April 13, 2012, Herrera, who was driving a red Chevy Impala, admitted being a member of Anaheim Vatos Locos (AVLS) to the officer. Deputy Sheriff Andres Briceno testified that on March 10, 2014, Herrera admitted being a member of AVLS. Investigator Jason Smith testified he spoke with Herrera in June 2014. Herrera admitted he was a previous member of AVLS, but stated he no longer claimed membership in AVLS.

Smith also testified as a gang expert on AVLS. He explained the history of the gang, its common names and symbols, and its claimed territory. Smith opined that as of December 2014, the primary activities of AVLS included “assault with a deadly weapon, felonious possession of a firearm, and felony vandalism.” Smith testified that J.R.’s house was within AVLS’s claimed territory and the graffiti on J.R.’s garage was a common symbol for AVLS.

The prosecutor introduced two certified records of conviction (exhibits 19 and 20), which were admitted into evidence. Exhibit 19 showed that on September 7, 2010, Anthony Olea was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) and active participation in AVLS, a criminal street gang (§ 186.22, subd. (a)). Smith opined Olea was an active member of AVLS when he committed the offenses described in Exhibit 19. Smith formed his opinion after “reviewing [Olea’s] background, speaking with current and former gang experts from the [police] department, and the facts of the case along with his conviction of assault with a deadly weapon and active participation in a criminal street gang.” Exhibit 20 showed that on May 26, 2010, Michael Chavira was convicted of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), and he admitted he did so for the benefit of a criminal street gang, AVLS (§ 186.22, subd. (b)). Smith also opined Chavira was an active member of AVLS when he committed the crimes described in exhibit 20. Smith formed his opinion after “reviewing [Chavira’s] background and speaking with some gang experts from the department and investigators

that handled the case and his conviction for [being] a felon in possession of a firearm and for the benefit of the gang.”

Asked a hypothetical mirroring the facts in the case, Smith opined the crimes were committed for the benefit of a criminal street gang, AVLS.

At trial, Herrera presented an alibi defense, and claimed he was misidentified as J.R.’s assailant due in part to a “really, really suggestive” lineup.

Herrera testified he was at home when the crimes occurred, but admitted previously telling Browning he was working at the time. Herrera testified that he associated with AVLS, but was never a member of the gang, or an active participant. Herrera also denied admitting he was an AVLS member to police officers.

Herrera claimed that during the time of the incident, he was driving a motorcycle and his burgundy Chevy Impala was with a neighbor for repairs. The neighbor and his wife testified that Herrera’s Impala was parked on their driveway from late-November until mid-December 2014, when the police impounded the vehicle. The neighbor had no recollection of the evening of December 1, 2014. The wife testified it was possible that Herrera could have taken the vehicle that evening without her knowledge because she went to bed early. The defense also produced evidence that a nearby male resident owned a similar red Chevy Impala. Browning investigated the defense lead and learned the vehicle was driven by the owner’s daughter, who had no connection to AVLS. This Impala also did not have a spot on its rear bumper area.

Browning, who compiled and conducted the pretrial photographic lineup with the victim, admitted he made a mistake in preparing the photographic lineup by not redacting Herrera’s neck tattoo, explaining he should have blackened-out the tattoo and put a matching black mark on all of the other people pictured. Browning testified J.R. never made any reference to Herrera’s neck tattoo when he identified Herrera as the assailant.

Defense expert, John Wixted, a professor who studied memory and researched facial recognition in the eyewitness identification context, opined that Herrera received an “unfair” lineup. In Wixted’s opinion, the lineup was unfair because the suspect was described as having a tattoo, and the only person in the lineup pictured with a tattoo was Herrera.

II

DISCUSSION

A. *Pretrial Identification Procedure*

It is well-established that “convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) Herrera contends the pretrial photographic lineup in this case was impermissibly suggestive because his picture was the only one showing a male with a neck tattoo. At trial, however, Herrera failed to move to suppress or exclude the pretrial lineup or J.R.’s in-court identification. Nor did he object to the admission of that evidence. Accordingly, he has forfeited any claim of error. (See Evid. Code, § 353, subd. (a) [verdict or finding shall not be set aside unless “[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion”]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-20 [“defendant forfeited the issue of the evidence’s admission by his failure to make a timely objection”].)

In a related claim, Herrera argues his trial counsel was ineffective for failing to object to the admission of the pretrial identification procedure and in-court identification. “In order to demonstrate ineffective assistance, a defendant must first show counsel’s performance was deficient because the representation fell below an

objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) "'In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.' [Citation]" (*Id.* at p. 215.) "Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621 (*Hayes*).)

Here, there is a plausible tactical purpose of trial counsel's failure to object. Herrera's alibi defense – that he was home at the time of the incident – was uncorroborated and inconsistent with his prior statements to Browning. In light of the weak alibi defense, counsel may have believed he needed to argue that the victim had misidentified Herrera based on an unduly suggestive lineup. Counsel reasonably may have believed that he could not meet his burden to show J.R.'s in-court identification of Herrera was the product of a suggestive lineup. Counsel may have known J.R. based his identification of Herrera on his facial features other than his tattoo. The evidence of the lineup, particularly with Browning's admission that he made a mistake in compiling the photographic six-pack by not redacting the neck tattoo, presented a stronger case for misidentification than Herrera would have if the pretrial photographic identification had been excluded. Thus, because there is a plausible tactical reason for not objecting, we conclude Herrera has not shown that his trial counsel was ineffective.

B. *Gang Expert's Reliance on Hearsay*

The amended information alleged that Herrera committed his crimes for the benefit of, at the direction of, and in association with AVLS, a criminal street gang

(§ 186.22, subd. (b)(1)). “To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group’s primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group’s members must engage in, or have engaged in, a pattern of criminal gang activity.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*)). A “pattern of criminal gang activity” is defined as gang members’ individual or collective “commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or *conviction* of two or more” enumerated predicate offenses during a statutorily defined time period. (§ 186.22, subd. (e), italics added.)

Here, to prove the required two predicate offenses, the prosecutor introduced two certified records of conviction. Herrera contends these records do not show the perpetrators (Olea and Chavira) were AVLS gang members. Citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), Herrera argues he was denied his confrontation rights because Smith improperly relied on testimonial case-specific hearsay to opine that Olea and Chavira were active AVLS members when they committed the predicate offenses. In *Sanchez*, our Supreme Court held that a defendant’s confrontation rights are violated where a gang expert “relie[s] upon” and “relate[s]” as true statements in police investigation files, STEP notices and field identification cards filled out by other officers to opine about case-specific facts, such as “evidence of defendant’s membership” in a specific criminal street gang or his intent to benefit that gang. (*Id.* at pp. 694, 696-699.) Here, Smith opined that Olea and Chavira were active AVLS members when they committed the predicate offenses based on their background information, speaking with other officers, and the convictions on the predicate offenses. However, defense counsel did not object to Smith’s testimony based on a *Sanchez* violation. Thus, Herrera has forfeited the claim. (*People v. Seijas* (2005) 36 Cal.4th 291, 302 [“defendant’s failure to

make a timely and specific objection’ on the ground asserted on appeal makes that ground not cognizable”].)

Herrera contends his counsel was ineffective for failing to make a *Sanchez* objection, and he was prejudiced by the error. As noted, “[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel’s tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel’s incompetence.” (*Hayes, supra*, 52 Cal.3d at p. 621.) Here, counsel may have decided not to object to Smith’s testimony based on a reasonable belief that the testimony did not violate *Sanchez*. (See *People v. Mendoza* (2000) 78 Cal.App.4th 918, 924 [“counsel is not ineffective in failing to make an objection when the objection would have likely been overruled by the trial court”]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1188 [trial attorneys not ineffective for failing to object to evidence if they reasonably believed it was pointless to do so because evidence would be admitted via another means].)

Smith’s opinion that Olea and Chavira were active AVLS gang members when they committed the predicate offenses was based on Smith’s review of their background, his conversations with other officers, and his review of the court records relating to the convictions. The records of conviction show that Olea committed assault with a deadly weapon and was an active participant in AVLS, a criminal street gang, when he committed the offense, and that Chavira admitted he committed the felony of being a felon in possession of a firearm for the benefit of AVLS, a criminal street gang. Those convictions are powerful evidence that Olea and Chavira were active AVLS gang members when they committed the predicate offenses. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 587 [plea of no contest to firearm possession charge and attached gang enhancement was “powerful evidence” of active gang membership].) Moreover, even after *Sanchez*, a gang expert may still rely on the records of conviction to opine about gang membership. An expert may relate as true case-specific facts asserted in hearsay statements if the hearsay statements are “independently proven by competent

evidence or are covered by a hearsay exception.” (*Sanchez*, 63 Cal.4th at p. 686.) “By its terms, certified records of conviction fall within the definition of official records contained in Evidence Code section 1280 (the official records exception to the hearsay rule), and are per se admissible as such.” (*Duran*, *supra*, 97 Cal.App.4th at p. 1461.) Moreover, “Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred.” (*Id.* at p. 1460.) Finally, there is no confrontation clause violation because public records documenting convictions are nontestimonial in nature. (See *United States v. Weiland* (9th Cir. 2005) 420 F.3d 1062, 1076-1077 [records of conviction are public records and are not testimonial in nature].) In short, Smith did not violate *Sanchez* when he relied on the records of convictions to opine about gang membership. Accordingly, Herrera has not shown trial counsel was ineffective for failing to object to Smith’s testimony. (See *People v. Kelly* (1992) 1 Cal.4th 495, 520 [“A reviewing court will not second-guess trial counsel’s reasonable tactical decisions.”].)

C. *Matter Remanded for Resentencing*

The parties agree that the matter should be remanded for the trial court to exercise its newly granted discretion as to the 10-year firearm enhancement (§ 12022.5, subd. (a)), and the five-year prior serious felony enhancement (§ 667, subd. (a)). (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 679 [remand for resentencing pursuant to SB No. 620]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [remand for resentencing pursuant to SB No. 1393].) They also agree that in this case, the trial court cannot impose both a firearm enhancement under section 12022.5, subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B). (*People v. Le* (2015) 61 Cal.4th 416, 429.) We agree with the parties. The matter is remanded to the trial court for resentencing. We note that if the trial court exercises its discretion not to strike the firearm enhancement, it cannot impose the gang enhancement. If the trial court

decides to strike the firearm enhancement, however, it may exercise its discretion and impose the gang enhancement.¹

III

DISPOSITION

The matter is remanded to the superior court for resentencing consistent with this opinion. Following resentencing, the trial court is directed to issue an amended abstract of judgment and forward it to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.

¹ Nothing in this opinion is intended to indicate in what manner the trial court should exercise its discretion.